NSW Law Reform Commission
Locked Bag 5000
Parramatta
NSW 2124
Australia

5 April 2024

BY E-MAIL: nsw-lrc@dcj.nsw.gov.au

Dear Review Secretary,

The Australian Christian Lobby (ACL) is grateful for the opportunity to make a submission on the *Review of the effectiveness of section 93Z of the Crimes Act 1900 (NSW) in addressing serious racial and religious vilification in NSW*.

We would appreciate an opportunity to meet with the Commission to discuss our submission.

Thank you for giving the following submission your careful consideration.

Yours Sincerely,

Joshua Rowe
ACL State Director NSW
[redacted]

SUBMISSION:

Effectiveness of section 93Z of the Crimes Act 1900 (NSW) in addressing serious racial and religious vilification in NSW

AUSTRALIAN CHRISTIAN LOBBY

About Australian Christian Lobby

The vision of the Australian Christian Lobby (ACL) is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With around 250,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the Voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

acl.org.au

Executive Summary

- The ACL submits that the Inquiry should have close regard to, and fully observe, the requirements of international law set out in the Appendix when considering any changes to section 93Z *of the Crimes Act 1900 (NSW)*.
- In particular, there should be no lowering of the threshold for liability under section 93Z.

Submission

The importance of international law standards

The ACL is concerned to ensure that all Australian jurisdictions have proper regard to principles of international law when considering legislation which interferes with rights protected by the International Covenant on Civil and Political Rights (ICCPR), especially in this context freedom of expression protected by article 19. Australia has an obligation to secure those rights in law.

The ACL accepts that there is a role that anti-vilification prohibitions play in support of anti-discrimination law. However, Australian jurisdictions already massively overstep the appropriate limits of such prohibitions, with serious consequences for the democratic freedoms which are integral to Australian society.

There is a wealth of guidance available from the UN, which explains the proper means for preserving the necessary balance between rights. The Appendix below contains relevant extracts from:

- The report of 2019 to the General Assembly by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/74/486, 9 October 2019)
- General Comment No.34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011.

These standards are specifically relevant to the regulation of hate speech. These cannot be ignored in any assessment of human rights compatibility in connection with section 93Z.

The ACL is especially concerned at the question of "the desirability of harmonisation and consistency between New South Wales, the Commonwealth and other Australian States or Territories" raised in the Terms of Reference. Convergence of laws to a common standard set by Australian States or Territories would produce outcomes incompatible with and contrary to the clear standards established by the ICCPR, and in related conventions such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Queensland's proposed Anti-discrimination Bill Clause 85 is not an appropriate model for serious vilification

Proposals earlier this year for Queensland's anti-discrimination Bill contain provisions (Clauses 84 and 85) which are seriously non-compliant with the freedom of expression rights of Australians established by article 19 of the ICCPR. In particular, these Clauses avoid any assessment of the necessity of restricting speech, as required by article 19(3).

The following international law requirements explained in the UN extracts in the Appendix are among the most relevant to the Queensland Bill, and this Inquiry. The anti-vilification provisions of the Queensland Bill should not be followed in any respect in this Inquiry.

- The terms "hateful, reviling, seriously contemptuous or seriously ridiculing" in Clause 84 of the Queensland Bill, and "hatred towards, serious contempt for, or severe ridicule" in Clause 85" are far below the threshold established for "hatred" and "hostility" in article 20(2) of the ICCPR, which requires "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". Under international law "hatred" and "hostility" is understood as "intense and irrational emotions of opprobrium, enmity and detestation towards the target group"; "advocacy" as "requiring an intention to promote hatred publicly towards the target group"; and "incitement" as "statements about...groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups".
- The proposed Clauses 84 and 85 offend head on the principle that the prohibition of "insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination" may only be prohibited where it "clearly amounts to incitement to hatred or discrimination"...The terms "ridicule" and "justification" are extremely broad and are generally precluded from restriction under international human rights law, which protects the rights to offend and mock. Thus, the ties to incitement and to the framework established under article 19(3) of the Covenant help to constrain such a prohibition to the most serious category.
- A "law" [restricting freedom of expression] (in the way Clauses 84 and 85 would) must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.

- Restrictive measures on freedom of expression (in Clauses 84 and 85) must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.

Clause 85 (addressing more serious forms of vilification than Clause 84) applies an inappropriate standard for a vilification prohibition. Under the existing section 131A of the existing Anti-Discrimination Act 1991 (Qld), inciting hatred is required to occur "in a way that includes— (a) threatening physical harm towards, or towards any property of, the person or group of persons; or (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons." That and similar is the norm in comparison provisions in Australia.

Clause 85 does not have the crucial requirement found in section 131A of "knowingly or recklessly inciting". It is enough in Clause 85 that a person just "engages in conduct that incites or is reasonably likely to incite," which introduces matters outside the person's control to predict. Intention is the more appropriate requirement.

The proposed Clause 85 is so uncertain that no one can predict whether or in what circumstances they will be liable for what they say. It should be amended to align with the existing section 131A.

Conclusion

The Inquiry should not recommend any changes to section 93Z.

The anti-vilification provisions of the Queensland Bill represent possibly the worst model in Australia for addressing hate speech.

Any human rights analysis of proposed changes to section 93Z should comply in all respects with clear UN guidance on hate speech provisions.

Appendix

Extracts from the report of 2019 to the General Assembly by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/74/486, 9 October 2019)

8. Under article 20 (2) of the [International Covenant on Civil and Political Rights], States parties are obligated to prohibit by law "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". States are not obligated to criminalize such kinds of expression. The previous Special Rapporteur explained that article 20 (2) relates to (a) advocacy of hatred, (b) advocacy which constitutes incitement, and (c) incitement likely to result in discrimination, hostility or violence (A/67/357, para. 43)...

13. In its general comment No. 34 (2011), the Human Rights Committee found that whenever a State limits expression, including the kinds of expression defined in article 20 (2) of the Covenant, it must still "justify the prohibitions and their provisions in strict conformity with article 19".16 In 2013 , a high-level group of human rights experts, convened under the auspices of the United Nations High Commissioner for Human Rights, adopted an interpretation of article 20 (2).17 In the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, key terms are defined as follows:

> "Hatred" and "hostility" refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; the term "advocacy" is to be understood as requiring an intention to promote hatred publicly towards the target group; and the term "incitement" refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups (A/HRC/22/17/Add.4, appendix, footnote 5).18

14. A total of six factors were identified in the Rabat Plan of Action to determine the severity necessary to criminalize incitement (ibid, para. 29):

> (a) The "social and political context prevalent at the time the speech was made and disseminated";
>
> (b) The status of the speaker, "specifically the individual's or organization's standing in the context of the audience to whom the speech is directed";
>
> (c) Intent, meaning that "negligence and recklessness are not sufficient for an offence under article 20 of the Covenant", which provides that mere distribution or circulation does not amount to advocacy or incitement;
>
> (d) Content and form of the speech, in particular "the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed";

> (e) Extent or reach of the speech act, such as the "magnitude and size of its audience", including whether it was "a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement";
>
> (f) Its likelihood, including imminence, meaning that "some degree of risk of harm must be identified", including through the determination (by courts, as suggested in the Plan of Action) of a "reasonable probability that the speech would succeed in inciting actual action against the target group".

15. In 2013, the Committee on the Elimination of Racial Discrimination, the expert monitoring body for the International Convention on the Elimination of All Forms of Racial Discrimination, followed the lead of the Human Rights Committee and the Rabat Plan of Action. It clarified the "due regard" language in article 4 of the Convention as meaning that strict compliance with freedom of expression guarantees is required.19 In a sign of converging interpretations, the Committee emphasized that criminalization under article 4 should be reserved for certain cases, as follows:

> The criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity.20

16. The Committee on the Elimination of Racial Discrimination explained that the conditions defined in article 19 of the International Covenant on Civil and Political Rights also apply to restrictions under article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.21 With regard to the qualification of dissemination and incitement as offences punishable by law, the Committee found that States must take into account a range of factors in determining whether a particular expression falls into those prohibited categories, including the speech's "content and form", the "economic, social and political climate" during the time the expression was made, the "position or status of the speaker", the "reach of the speech" and its objectives. The Committee recommended that States parties to the Convention consider "the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question".22

17. The Committee also found that the Convention requires the prohibition of "insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination", emphasizing that such expression may only be prohibited where it "clearly amounts to incitement to hatred or discrimination".23 The terms "ridicule" and "justification" are extremely broad and are generally precluded from restriction under international human rights law, which protects the rights to offend and mock. Thus, the

ties to incitement and to the framework established under article 19 (3) of the Covenant help to constrain such a prohibition to the most serious category.

18. In the Rabat Plan of Action, it is also clarified that criminalization should be left for the most serious sorts of incitement under article 20 (2) of the Covenant, and that, in general, other approaches deserve consideration first (A/HRC/22/17/Add.4, appendix, para. 34). These approaches include public statements by leaders in society that counter hate speech and foster tolerance and intercommunity respect; education and intercultural dialogue; expanding access to information and ideas that counter hateful messages; and the promotion of and training in human rights principles and standards. The recognition of steps other than legal prohibitions highlights that prohibition will often not be the least restrictive measure available to States confronting hate speech problems.

16 [Human Rights Committee, general comment No. 34 (2011)], para. 52, and, in the context of art. 20 (2) of the Covenant in particular, see para. 50.

17 See, e.g., Committee on the Elimination of Racial Discrimination, general recommendation No. 35 (2013) on combating racist hate speech.

18 The previous Special Rapporteur Frank La Rue defined as a key factor in the assessment of incitement whether there was "real and imminent danger of violence resulting from the expression" (A/67/357, para. 46). See also Article 19, *Prohibiting Incitement to Discrimination, Hostility or Violence* (London, 2012), pp. 24–25.

19 Committee on the Elimination of Racial Discrimination, general recommendation No. 35 (2013), para. 19. The Committee understands the due-regard clause as having particular importance with regard to freedom of expression, which, it states, is "the most pertinent reference principle when calibrating the legitimacy of speech restrictions".

20 Committee on the Elimination of Racial Discrimination, general recommendation No. 35 (2013), para. 12.

21 Ibid., paras. 4 and 19–20.

22 Ibid., paras. 15–16.

23 Ibid., para. 13.

Extracts from General Comment No.34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011.

22. Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality.42 Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.43

> 42 See communication No. 1022/2001, Velichkin v. Belarus, Views adopted on 20 October 2005.
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> 43 See the Committee's general comment No. 22, Official Records of the General Assembly, Fortyeighth Session, Supplement No. 40 (A/48/40), annex VI

25. For the purposes of paragraph 3, a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly53 and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.54 Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.

> 53 See communication No. 578/1994, de Groot v. The Netherlands, Views adopted on 14 July 1995. 54 See general comment No. 27.

33. Restrictions must be "necessary" for a legitimate purpose…

34. Restrictions must not be overbroad. The Committee observed in general comment No. 27 that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected…The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law".72 The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.73

35. When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.74

72 General comment No. 27, para. 14. See also Communications No. 1128/2002, Marques v. Angola; No. 1157/2003, Coleman v. Australia.

73 See communication No. 1180/2003, Bodrozic v. Serbia and Montenegro, Views adopted on 31 October 2005.

74 See communication No. 926/2000, Shin v. Republic of Korea.